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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )

Redevelopment of Spectrum to )  
Encourage Innovation in the )  
Use of New Telecommunications )  
Technologies )

ET Docket No. 92-9 ✓

To: The Commission

REPLY COMMENTS OF THE  
UTILITIES TELECOMMUNICATIONS COUNCIL

Pursuant to Section 1.429(g) of the Commission's Rules, the Utilities Telecommunications Council (UTC) hereby submits the following reply to the comments filed on UTC's "Petition for Clarification and/or Reconsideration" with respect to the Third Report and Order (Third R&O), in ET Docket No. 92-9, 8 FCC Rcd 6589 (1993), in the above captioned matter.<sup>1/</sup>

I. INTRODUCTION

UTC, as the national representative on communications matters for the nation's electric, gas and water utilities, and natural gas pipelines has been an active participant in this proceeding and the related proceedings dealing with the reallocation of the 2 GHz band.

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<sup>1/</sup> These reply comments are timely filed in accordance with the specifications of FCC Rule Section 1.4(h) regarding the filing of responses to comments served by mail.

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Although UTC generally concurs with the market-based transition plan that the Commission adopted, as it reflects the relocation plan first recommended by UTC in March of 1992,<sup>2/</sup> there are a few details that need to be clarified or amended in order to in order to ensure that all incumbents are provided with the protections intended by this plan. It is for this reason that UTC filed its petition on October 4, 1993. Below, UTC addresses the comments filed on UTC's petition.

**II. COMMENTERS AGREE THAT THE TRANSITION PLAN MUST BE CLARIFIED OR AMENDED IN ORDER TO PROVIDE ALL INCUMBENT MICROWAVE USERS THE ASSURANCES OF THIS PLAN**

**A. The Commencement Date For The Two-Year Voluntary Negotiation Period Should Be Clarified**

In the Third R&O the Commission adopted a two-year fixed period of "voluntary negotiations" between emerging technology licensees and existing 2 GHz microwave users that must expire before a one-year "mandatory negotiation" period goes into effect. In its petition, UTC noted that in adopting this requirement the Commission was not clear as to when this two-year negotiation period commences for the various spectrum blocks and markets to be served by emerging technologies.

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<sup>2/</sup> UTC's "Recommended FCC Action Plan For Accommodating New Technologies" filed as an ex parte presentation in ET Docket No. 92-9 on March 24, 1992. A copy of the plan is also contained in Appendix C of the First Report and Order and Third Notice of Proposed Rulemaking in ET Docket No. 92-9, 7 FCC 6886.

Specifically, the Third R&O appears to indicate that the two-year voluntary negotiation period commences upon FCC "acceptance of applications for emerging technology services."<sup>3/</sup> As UTC noted, such a rule only makes sense if all of the emerging technologies that will occupy the spectrum reserve commence licensing at the same time. Otherwise, the voluntary negotiation period offers little or no protection to 2 GHz microwave licensees located in portions of the band that have not been allocated for use by specific emerging technologies, or for market areas that do not commence licensing until a later date.

The fact that the FCC's recent decision allocating spectrum for the development of personal communications services (PCS), GEN. Docket 90-314<sup>4/</sup>, only allocated a portion of the 2 GHz "spectrum reserve," demonstrates that UTC's concern is valid. The adoption of a single universal commencement date for the voluntary negotiation period for this spectrum would be an arbitrary and inequitable decision.

In comments echoing UTC, the American Petroleum Institute (API) states that the two-year voluntary negotiation period should not commence upon the date when the FCC accepts applications in a given band, but rather should commence on the

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<sup>3/</sup> Third R&O, para. 15.

<sup>4/</sup> Second Report and Order, GEN. Docket No. 90-314, FCC 93-451, released October 22, 1993.

date of acceptance of requests for licensing in each specific market.<sup>5/</sup> Similarly, the Association of American Railroads (AAR) filed a "Petition For Reconsideration" essentially arguing this same point.<sup>6/</sup> Moreover, with regard to delaying the commencement of the negotiation period for bands not yet allocated, potential PCS licensees such as American Personal Communications (APC) do not oppose UTC's proposed clarification.<sup>7/</sup>

API also supports UTC's recommended clarification that the triggering event for the two year voluntary negotiation period is not the acceptance of the preliminary auction or lottery applications in each band, but is instead the acceptance of market specific formal requests for frequency assignment and licensing that occurs after the selection of tentative licensees. As API notes, unless such clarification is made, delays between acceptance of preliminary applications and final selection of new technology licensees could eliminate the opportunity for voluntary negotiations between incumbent licensees and new technology providers.<sup>8/</sup> Moreover, as UTC noted such a clarification would also spare incumbent 2 GHz microwave licensees the significant inconvenience of engaging in futile

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<sup>5/</sup> API, p. 4.

<sup>6/</sup> AAR, Petition For Reconsideration, pp. 4-5.

<sup>7/</sup> APC, p. 15 fn. 13.

<sup>8/</sup> API, p. 4.

negotiations with a large number of unsuccessful emerging technology license applicants.

Cox Enterprises (Cox) and APC oppose this proposed clarification arguing that microwave licensees will be on effective notice that they have to relocate when PCS applications are filed,<sup>9/</sup> and that emerging technology applicants will have an incentive to negotiate meaningfully and seriously with incumbent microwave licensees in order to ascertain cost estimates prior to auctions.<sup>10/</sup> These arguments are misplaced. The mere filing of a preliminary application for a particular block of frequencies, ranging from 10 MHz to 30 MHz wide under the initial PCS allocation,<sup>11/</sup> is not in any way indicative that a particular frequency in a specific geographic area within the general license block needs to be cleared.<sup>12/</sup> Moreover, even if auctioning will help to ensure the sincerity of applicants, it will not change the fact that microwave licensees will need to expend time and resources engaging in duplicative negotiations if the initial filing of applications triggers the commencement of voluntary negotiations. This is necessarily true, since competitive

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<sup>9/</sup> Cox, p. 11, fn. 23.

<sup>10/</sup> APC, pp. 15-16.

<sup>11/</sup> Second Report and Order, GEN Docket No. 90-314.

<sup>12/</sup> This is particularly true with regard to frequencies in bands adjacent to blocks being assigned to emerging technology licensees. These licensees cannot possibly be expected, to be on notice regard the interference potential of an applicant's specific emerging technology.

bidding is only to be used in situations where there is mutual exclusivity among competing applicants.

**B. Tax Certificates Should Be Available Throughout The Entire Negotiation Period Not Just The Initial Two-Year Voluntary Period**

API agrees with UTC that the Commission's decision to restrict the availability of tax certificates to 2 GHz microwave licensees that relocate during the initial two-year voluntary negotiation period is unduly restrictive.<sup>13/</sup> Microwave licensees that are located in portions of the 2 GHz band or areas of the country where emerging technologies do not develop during the initial two-year voluntary negotiation period should not be denied the added negotiation flexibility provided by tax certificates.

Further, the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management (UTAM), Apple Computer, and APC all agree with UTC that tax certificates should also be available to 2 GHz microwave licensees operating in bands designated for the development of unlicensed devices.

Accordingly, UTC reiterates its proposal that the FCC provide tax certificates in all cases unless: (1) the Commission is forced to modify the incumbent's license over the incumbent's objections, and (2) the Commission finds that the incumbent's

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<sup>13/</sup> API, p. 5.

objections were patently without merit. In the alternative, the FCC should allow tax certificates for any agreement voluntarily entered during either the two-year or one-year negotiation periods.

APC argues in opposition to UTC's recommendations that tax certificates are an incentive or "reward" for voluntary negotiations, and therefore should be limited to the two-year voluntary negotiation period.<sup>14/</sup> In addition to not addressing the inequity of such a requirement on incumbent licensees located on frequencies or areas of the country in which emerging technology licensees do not immediately seek to operate, APC mischaracterizes the value and use of tax certificates. Tax certificates should not be regarded as a "reward" but rather as a tool that can be used to expedite the relocation process. Moreover, the primary beneficiaries of tax certificates are the emerging technology licensees that will not be forced to cover the increased tax liability that microwave users face in transitioning to higher bands or alternate media.<sup>15/</sup>

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<sup>14/</sup> APC, pp. 17-18.

<sup>15/</sup> 47 CFR Section 94.59(c)(1) compels the emerging technology service provider to guarantee payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium (emphasis added).

### III. CONCLUSION

While in general agreement with the FCC's market-based transition plan, there are a few details in the implementation of this plan that need to be clarified or amended in order to ensure that all incumbents are provided with the protections intended by this plan.

Commenters agree with UTC that the FCC should clarify that: (1) the acceptance of applications for emerging technology services only triggers the two-year voluntary negotiation period for those bands and markets for which new service license applications are being accepted; and (2) the triggering event for the two year voluntary negotiation period is the acceptance of the formal requests for frequency assignment and licensing that occurs after the selection of tentative licensees.

Further, UTC reiterates its request that tax certificates be provided in all cases unless: (1) the Commission is forced to modify the incumbent's license over the incumbent's objections, and (2) the Commission finds that the incumbent's objections were patently without merit. In the alternative, the FCC should provide tax certificates for any agreement voluntarily entered during either the two year or one year negotiation periods.



WHEREFORE, THE PREMISES CONSIDERED, the Utilities  
Telecommunications Council respectfully requests the Commission  
to take actions consistent with the views expressed herein.

Respectfully submitted,

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November 23, 1993

## **CERTIFICATE OF SERVICE**

I, Kim B. Winborne a secretary with the Utilities Telecommunications Council, hereby certify that a copy of the foregoing Reply Comments was hand delivered, this 23rd day of November, 1993, to each of the following:

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